argued by W. Addison ... all here
Feb 27 – Am. Miller

SUPREME COURT OF THE UNITED STATES.

No. ~~837~~ 199 119.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

LORTON HOLLIDAY.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

GOVERNMENT PRINTING OFFICE.

Indictment for selling liquor to Indians under ...
13 Feb. 68, 12 U.S.St. 330.9

Treaty Aug 2, 55, 11 U.S.St. 633

Indians reside on lands secured by the treaty in Isabella Co
Question to adjoin Isabella & the Sou...
Act prohibits sale to any Indian under charge of Supt or ...
or in Isabella County
treaty pursuant tribal organ for purposes of managing affairs of ...
10 years to land allotment – 5 more patents ...
Reading of division

SUPREME COURT OF THE UNITED STATES.

No. 337.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

LORTON HOLLIDAY.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

1 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

At a circuit court of the United States, begun and held at Detroit, for the eastern district of Michigan, on Wednesday, the fourth day of November, in the year of our Lord one thousand eight hundred and sixty-three, and in the eighty-eighth year of American independence.

Present: The honorable Noah H. Swayne and the honorable Ross Wilkins.

THE UNITED STATES OF AMERICA,
vs.
LORTON HOLLIDAY.

This is an indictment against the defendant under the act of February, in the year of our Lord one thousand eight hundred and sixty-two, prohibiting the sale of spirituous liquor to the Indians under the charge of any Indian agent appointed by the United States. (Volume 12, U. S. Statutes at Large, pages 338 and 339.)

The indictment charged defendant with selling, at Alma, Gratiot county, in said district, to one Otibsko, an Indian under charge of the Hon. De Witt C. Leach, an Indian agent appointed by the United States for Michigan.

1. The defendant pleads in bar, first, that the said county of Gratiot
2 was an organized county of the State of Michigan, and not within the Indian country, and that there was no Indian reservation within it.

2. That the said Otibsko did not reside in the Indian country, but in the county of Isabella, in Michigan, an organized county containing no Indian reservation.

3. That Otibsko was a male inhabitant of Isabella county, a native

of the United States, of Indian descent, who had voted at elections for county and town officers.

4. That Otibsko was one of the Chippewa Indians of Saginaw, mentioned in the treaties of January 14th, 1837, and August 2d, 1855.

5. That Otibsko accepted land under the treaty of 1855, in Isabella county, and entered into possession under a certificate from the United States, and paid taxes levied upon said land by the State authorities, and that the tribal organization of said Chippewa Indians was dissolved by said treaty of 1855, except in so far as it was necessary to preserve it for the purposes of said treaty.

6. That said Chippewa Indians occupy a territory of limited extent, to wit, six townships within the State of Michigan, are few in number, and surrounded by a white population.

That the constitution of Michigan provides that every civilized male inhabitant of Indian descent, a native of the United States and not a member of any tribe, shall be an elector and entitled to vote; and that by law, in Michigan, all Indians may sue and be sued
3 in the State courts in the same way as other inhabitants, and that they are entitled to the same judicial rights and privileges.

To which plea the attorney of the United States filed a replication stating, that although the matters in said plea contained were true, yet, that the name of the said Otibsko was and is on the pay-roll of the said De Witt C. Leach, Indian agent appointed by the United States for Michigan, among said Chippewas at Saginaw; and that said Indian agent annually distributes a sum of money and treaty property for the benefit of the said Otibsko.

That by the regulations of the Indian bureau, and by its present practice, and by the practice both before and after the said treaty of 1855, the Indian agent for Michigan is required to deal with the chiefs and headmen of said Chippewa Indians as such, and to take the receipt of such chiefs and headmen for money and property delivered to the said Chippewa Indians under the provisions of said treaties; and that the Secretary of the Interior and the Commissioner of Indian Affairs have decided that it is necessary, in order to carry into effect the provisions of said treaty of 1855, that the tribal organization of said Chippewas should be preserved, in so far that their chiefs and headmen should continue to be the representatives of said Chippewas, so that said chiefs and headmen should be the medium of communication between the said United States and said Chippewas.

4 And that said Otibsko and the other Chippewas of Saginaw recognize and acknowledge said chiefs and headmen.

That within three months after the date of said treaty of 1855 the said Chippewas selected six adjoining townships of land in the said county of Isabella, and gave notice thereof to their agent, as required by said treaty; and that the land mentioned in said plea as possessed by said Otibsko is a part of said six townships, and that said Otibsko resides thereon, and that said Chippewa Indians of Saginaw dwell upon said six townships.

That said Otibsko was above 40 years of age, and was born a member of said Chippewa tribe of Indians.

That said Chippewa Indians in general retain their wandering habits, subsisting mainly by hunting and fishing, and in general do not conform to the agricultural and mercantile pursuits of the whites, and do not in general intermarry with them.

To which replication the defendant demurred. And the attorney of the United States joined in demurrer.

That said indictment and proceedings were remitted to the circuit court by the district court as containing difficult and important questions of law.

The cause coming on to be argued at this term, the following questions arose:

5 1. Whether the act of Congress of February, 1862, does by proper construction extend to a sale of liquor such as is charged in the indictment under the circumstances stated in the plea and replication.

2. Whether, if construed to so extend, Congress has the constitutional right to so enact.

3. Whether, under the circumstances stated in the plea and replication, the Indian named can be considered as under the charge of an Indian agent within the meaning of the act.

4. Whether, upon the facts stated in the plea and replication, the said Otibsko was a civilized Indian, not a member of any tribe within the meaning of the constitution of Michigan, and whether he was a citizen of the State of Michigan.

5. Whether the provisions of the constitution and laws of the State of Michigan, stated in the plea of the defendant, were, under all the facts and circumstances stated in said plea and replication, and, under the constitution, the said treaties and act of Congress of 1862, a bar to said indictment.

On which five questions the opinions of the judges were opposed; whereupon, on a motion of the defendant, by his counsel, that points on which the disagreement hath happened may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided.

6 It is ordered that the foregoing state of the pleadings, and the said questions framed under the direction of the judges, be certified according to the request of the defendant and his counsel, and the law in that case made and provided.

UNITED STATES OF AMERICA,
Eastern District of Michigan, to wit:

I, William D. Wilkins, clerk of the circuit court of the eastern district of Michigan, do hereby certify the foregoing to be a copy from the minutes.

Given under my hand and seal of office, at Detroit, on
[SEAL.] the fourth day of November, in the year of our Lord one thousand eight hundred and sixty-three.

WM. D. WILKINS, *Clerk.*

Filed December 23, 1863.

1259

SUPREME COURT OF THE UNITED STATES.

No. ~~354.~~ 248-134.

THE UNITED STATES, PLAINTIFFS,

vs.

JOSEPH HAAS.

ON CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 354.

THE UNITED STATES, PLAINTIFFS,

vs.

JOSEPH HAAS.

ON CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

1 UNITED STATES OF AMERICA,
District of Minnesota:

At a circuit court of the United States, begun and held at Saint Paul, for the district of Minnesota, on Monday, the fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-three, and in the eighty-seventh year of American independence.

Present: The honorable Samuel F. Miller and Rensselaer R. Nelson, esquires.

THE UNITED STATES OF AMERICA
vs.
JOSEPH HAAS.

The defendant in this case was, at the June term of the U. S. district court for said district, in 1862, indicted under the act of Congress approved February 13th, 1862, entitled "An act to amend an act entitled An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers," approved June thirteenth, eighteen hundred and ~~thirty~~-four. 12 U. S. St. L. 338, § 9

2 The indictment charges the defendant with having sold spirituous liquor to a certain Indian of the Winnebago tribe, under the charge of St. A. D. Balcombe, United States Indian agent for said tribe, at a time subsequent to the passage of said act, and at Mankato, in the county of Blue Earth, in the State of Minnesota, but does not charge the *locus in quo* to be within the reservation belonging to said tribe, or within any Indian reservation, or in the Indian country.

It is conceded that the *locus in quo* is not upon any Indian reservation, or in the "Indian country," but is within the State of Minnesota.

The defendant was, at the same term of the said district court, tried and convicted of the offence charged in the indictment, and thereupon he, by his counsel, moved that judgment upon the verdict be arrested for the following reasons:

1. Because the act of Congress under which the indictment is found is a mere police regulation, which cannot be extended in its operation beyond the territorial limits of the Indian country over which the United States has exclusive jurisdiction.

2. Because the power of Congress "to regulate commerce with the Indian tribes" does not include the authority to prohibit the sale of spirituous liquors, or any other article, to an individual Indian outside of any Indian reservation or the Indian country, and within a State and its jurisdiction. The act of selling spirituous liquor to an Indian at the *locus in quo*, is an offence only against the State
3 law prohibiting it, and is not, nor can be made, an offence against the United States.

The said mntion in arrest of judgment on said verdict was transferred from the said district court to this court for argument and determination, and the same came on to be heard and was argued at the present term thereof.

Upon the hearing of the cause on the motion in arrest of judgment the judges of the circuit are opposed in opinion on the following questions:

1. Whether, under the act of February 13th, 1862, the offence for which defendant is indicted was one of which the circuit court could have original jurisdiction? ~~[illegible]~~ No

2. Whether, under the facts above stated, any court of the United States had jurisdiction of the offence? Under act of 1862, the Ct

Which is ordered to be certified to the Supreme Court of the United States.

SAM. F. MILLER. [SEAL.]
R. R. NELSON. [SEAL.]

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I, Horatio E. Mann, clerk of the circuit court of the United
4 States of America for the district of Minnesota, do certify, hereby, the foregoing to be a true copy from the minutes of said court.

Given under my hand and the seal of said circuit court,
[SEAL.] at St. Paul, in said district, this 5th day of October, in the year of our Lord one thousand eight hundred and sixty-three.

HORATIO E. MANN, *Clerk.*

Filed 12 Jan., 1864.

Hudson Coon -

1265

Indictment for selling liquor to Indians

Liquor sold outside of reservation - Minnesota & Indian country -

Charge of Dist. Judge.

Must be satisfied that substantially same case with Holt

If so is entitled to judgment upon authority cited.

In the Supreme Court of the United States.

DECEMBER TERM, 1865.

THE UNITED STATES *vs.* HOLLIDAY. } No. 119.

THE UNITED STATES *vs.* HAAS. } No. 134.

BRIEF FOR THE UNITED STATES.

JAMES SPEED,
Attorney General.
J. HUBLEY ASHTON,
Assistant Attorney General.

In the Supreme Court of the United States.

DECEMBER TERM, 1865.

THE UNITED STATES,
vs.
LORTON HOLLIDAY. } No. 119.

THE UNITED STATES,
vs.
JOSEPH HAAS. } No. 134.

These are two cases of criminal prosecutions, instituted under the act of February 13, 1862, (amendatory of the act of June 30, 1834, "*regulating trade and intercourse with the Indian tribes,*") for violations of the provision of that act which declares "that if any person shall sell, exchange, give, barter, or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, * * * on conviction thereof before the proper district court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars." (12 Stat. at Large, 339.)

The prosecution against HOLLIDAY was instituted in the district court for the eastern district of Michigan. The prosecution against HAAS was instituted in the district court for Minnesota.

The cases were remitted into the circuit courts for the respective districts under the act of August 8,

1846, (9 Stat., 73,) authorizing the remission of indictments from the district to the circuit court.

In Holliday's case there was a special plea filed in the district court by the defendant, a replication by the United States, and a demurrer to the replication by the defendant.

In Haas' case the indictment was remitted to the circuit court after conviction and motion in arrest of judgment. (See U. S. *vs.* Kelley, 11 Wheaton, 417.)

Upon the hearing of the cases the judges of the respective circuit courts were opposed in opinion on certain questions stated in the records, and they certified these questions to this court to be finally decided.

The important questions raised and to be determined are the same in both of the cases. They are, therefore, argued, and may be decided, together.

THE FACTS OF THE CASES.

1—*Holliday's Case.*

The indictment charged the defendant with selling liquor at Alma, Gratiot county, Michigan, to one Otibsko, an Indian under the charge of an Indian agent appointed by the United States. The defendant's plea alleged that Gratiot county was an organized county of the State of Michigan; that it was not within the Indian country; and that no Indian reservation existed within it. It further alleged that Otibsko, the Indian named in the indictment, was one of the Chippewa Indians of Saginaw, mentioned in the treaties of January 14, 1837, and August 2, 1855; that the said Chippewa Indians occupy six townships in Isabella county, Michigan, under the treaty of 1855;

that Otibsko accepted lands in that county under said treaty, and entered into possession of them under a certificate from the United States; that the tribal organization of the said Chippewa Indians was dissolved by the treaty of 1855, except in so far as it was necessary to preserve it for the purposes of the treaty; and that Otibsko had voted at elections for county and town officers.

The defendant further pleaded certain provisions of the Constitution and laws of Michigan which confer political rights upon civilized male inhabitants of Indian descent, natives of the United States and not members of any tribes, and also judicial rights and privileges upon all Indians. . .

The replication filed by the government admitted the truth of the matters contained in the plea, but alleged that, pursuant to the existing treaties with the said Chippewas and the regulations and practice of the Interior Department and Indian bureau, the chiefs and head men of the said Chippewas continue to be the representatives of the tribe; that the Indian agent for Michigan is required to deal with the said chiefs and head men of the said Chippewas as such, and to take the receipts of such chiefs and head men for money and property delivered to the said Chippewas under the provisions of the treaties.

The replication further alleged that the said Otibsko recognises and acknowledges the chiefs and head men of the Chippewas of Saginaw, and resides with the said Indians on the lands in Isabella county selected by them under the treaty of 1855; and that the Indian agent of the United States annually distributes a sum

of money and treaty property for the benefit of the said Otibsko.

On this state of facts the questions mentioned in the record arose. (Rec. in Holliday's case, p. 3.)

2—*Haas' Case.*

The indictment charged that the transaction on which the prosecution was based occurred at Mankato, in the county of Blue Earth, in the State of Minnesota, but did not allege that the *locus in quo* it occurred was within the reservation belonging to the Winnebago tribe of Indians, or within any Indian reservation, or within the Indian country. The sale alleged in the indictment was a sale of liquor to a Winnebago Indian.

The judges of the circuit court for the district of Minnesota, on the motion in arrest of judgment, were opposed in opinion on the two questions—

1. Whether, under the act of February 13, 1862, the offence charged in the indictment was one of which the circuit court could have original jurisdiction?

2. Whether, under the facts stated, any court of the United States had jurisdiction of the offence?

I.

THE AUTHORITY OF THE DISTRICT COURTS RESPECTIVELY TO REMIT THESE INDICTMENTS INTO THE CIRCUIT COURTS, UNDER THE ACT OF AUGUST 8, 1846.

No question was made in HOLLIDAY'S case as to the jurisdiction of the circuit court; but this is the first question certified by the circuit court for Minnesota in HAAS' case. The question affects both cases. We therefore proceed to contend that an indictment found

in a district court, under the act of February 13, 1862, may be remitted, under the act of 1846, into the circuit court, so as to give that court jurisdiction of the case. (See act of 1846, 9 Stat., 73.)

The provisions of the second and third sections of the act of 1846 are to be considered. Under both sections, we contend, an indictment founded upon the act of 1862 in the district court may be lawfully remitted to the circuit court.

The second section of the act of 1846 provides that, "whenever the district attorney shall deem it necessary, it shall be lawful for any circuit court in session, by order entered on its minutes, to remit to the next term or session of the district court of the same district any indictment pending in the said circuit court, *when the offence or offences therein charged may be cognizable by the said district court;* and in like manner it shall be lawful for any *district court to remit to the next term or session of the circuit court of the same district any indictment pending in the said* district court."

The third section, after providing that the grand jury empanelled in any district may take cognizance of all crimes within the jurisdiction of the circuit and district courts, and that every indictment for a capital offence *presented* to the district court *shall*, by order of that court, be remitted to the circuit court, enacts that "the said district court *may*, moreover, in like manner, remit to the circuit court *any indictment* pending in said district court, when, in the opinion of the court, difficult and important questions of law are involved in the case; *and the proceedings thereupon shall thereafter be the same in the circuit court as if such in-*

dictment had been originally found and presented therein." (See 9 Stat. at Large, 72–73.)

It has been seen that under the act of 1862 the proper district court has alone jurisdiction of the offence charged in the present indictments. The point, therefore, presented for decision is whether, where a statute enacted subsequently to the act of 1846 creates an offence, and confers jurisdiction of it on the district, and not concurrently on the circuit, court, an indictment framed under that statute may be remitted to the circuit court, under the provisions of the act of 1846 just cited? Must the statute creating the offence, if enacted after the act of 1846, vest jurisdiction in *both* the district and circuit courts, in order that an indictment found in the former court may be lawfully remitted to the latter? Or do the provisions of the act of 1846 enable a district court to remit any indictment found therein to the proper circuit court, whether the offence charged be cognizable or not by the circuit court under the statute defining it? The latter is undoubtedly the true expression of the construction and effect of the act of 1846. It is nowhere declared in the act that it is requisite to the lawful remission of indictments, under either the second or the third section, from the district to the circuit court, that the offences charged should be cognizable in the first instance by the circuit as well as the district court. The second section declares that, "whenever the district attorney shall deem it necessary, * * * it shall be lawful for any district court to remit to the next term of the circuit court ANY INDICTMENT pending in the said district court." It will be observed that the restriction which, by the previous clause, is

imposed upon the remission of cases from the circuit to the district court—namely, that only those cases of which the district court has concurrent jurisdiction with the circuit court shall be remitted from the former to the latter—is, in the provision just cited in reference to the remission of cases from the district to the circuit court, entirely omitted; and the enactment is, that *any* indictment may be sent to the circuit from the district court for trial. The same remark is applicable to the enactment in the 3d section of the statute. It confers authority on the district court to send *any* case, in which difficult and important questions are involved, to the circuit court for trial. The authority is exercisable, so far as the words of the act declare, not merely in cases which might have been instituted in the circuit court in the first instance, but also in cases of which the circuit court might be regarded as having, in the first instance, no original cognizance. If it be said the provision, that "the proceedings thereupon shall thereafter be the same in the circuit court as if such indictment had been originally found and presented therein," indicates that Congress only contemplated the removal of cases to the circuit court of which it had concurrent jurisdiction with the district court—cases which might have originated in the circuit court—we remark, in reply, that the more natural and obvious interpretation of the provision is, that it was intended by Congress simply to describe and define the extent and character of the judicial authority and discretion which should be exercised by the circuit court in cases which might be remitted to it by the district judge, and not to impose a limitation upon the power

of the district court in regard to the remission of difficult and important cases to the superior tribunal.

We hold, then, that whether or not the present indictment might, under the law, have been found in the circuit court, it was subject to removal by the district judge, and was by him lawfully remitted to the circuit court. But we further contend that, by virtue of the eleventh section of the judiciary act of 1789, this indictment might have been presented to the circuit court. (1 Stat. at Large, 78.) That section confers on the circuit court "*concurrent jurisdiction with the district courts of the crimes and offences cognizable therein.*" We present the view that the series of statutes defining the jurisdiction of the several courts of the United States are statutes *in pari materia*, and, as such, to be read as parts of one complete and uniform code; and that, whenever any law creating an offence confers jurisdiction of it upon either the district or the circuit court, the other may take cognizance of it, unless the punishment of the offence be capital; in that class of offences the jurisdiction of the circuit court is exclusive. In all other cases, under the act of August 23, 1842, sec. 3, (5 Stat., 517,) the district courts have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States, just as, under the act of 1789, the jurisdiction of the circuit courts is concurrent with that of the district courts over all crimes cognizable therein.

The question now before the court has been judicially considered and decided in the circuit courts of the United States. It came before Mr. Justice McLean in the case of Campbell *v.* Kirkpatrick, (5 McLean's Rep., 175,) which was an indictment under the fugi-

tive slave act of 1850. This act conferred, in express terms, jurisdiction on the district court alone of the offence therein created, and of the civil prosecutions therein authorized. A motion to dismiss a case, under the act, remitted to the circuit court was sustained by Judge McLean, on the ground that the act of 1846 did not authorize any case, under a law passed subsequently to 1846, and of which the district court alone had jurisdiction, to be remitted to the circuit court. He said that the provisions of the act of 1846 apply only to cases of which the circuit and district courts have concurrent jurisdiction. But this view of the learned justice does not seem to be supported in the opinion by any reasoning or authority. In opposition to this opinion of Mr. Justice McLean may be placed the view of Mr. Justice Curtis, in a case of criminal prosecution under the fugitive act of 1850, which was remitted, under the 3d section of the act of 1846, into the circuit court for the District of Massachusetts. We allude to the case of the United States *v.* Morris, (1 Curtis's Rep., 26,) which was contested with great energy and ability on both sides, and in which it seems to have been conceded that the act of 1846 authorized the remission of the indictment. The only question in that case raised, was as to the time when it was competent for the district court to remit the case; but it is to be presumed that the present point would not have escaped either counsel or court if it had been supposed worthy of consideration. We regard this case as a full *offset* to the case in the Ohio circuit.

We have also in our favor the opinion of Mr. Justice Nelson, in a charge to the grand jury of the circuit court at New York, for October term, 1851, devoted

to a consideration of the fugitive slave law. In that charge the learned justice, alluding to the act of 1846, said: "There is a provision in a recent act of Congress by which the district court is authorized to adjourn or continue criminal cases pending therein to the circuit court, which, no doubt, embraces the cases in question. (Act August 8, 1846.)" See 2 Blatchford's C. C. Rep., 560.

We ask this court, therefore, to certify an opinion to the circuit court for the district of Minnesota, that the indictment against Haas was lawfully remitted, under the act of 1846, to the circuit court, and that that Court has jurisdiction of the case.

II.

THE CONSTRUCTION OF THE STATUTE.

In considering the act of 1862, the first question that arises is, whether Congress intended that the provision on which these indictments are founded should extend to transactions of the character described, not occurring within the Indian country or within any Indian reservations? In other words, must it appear, in order to constitute a selling of liquor to an Indian an offence against the United States, not only that the Indian was, at the time, "under the charge of an Indian agent," but also the sale was made in the Indian country, or in some Indian reservation? Obviously the statute requires that but one of these conditions should attach to the transaction, in order that an offence against it shall be committed. Clearly every sale of liquor to an Indian under the charge of a superintendent or agent, whether made

within or without the Indian country, within or beyond an Indian reservation, was intended to be inhibited and punished. The more limited view of the operation of the statute must be based upon a reading of its provision not warranted by the language of the legislature. Congress has not said that any person who may sell liquor to any Indian under the charge of an Indian agent *in the Indian country* shall be guilty of an offence, but has declared that every person shall be guilty of an offence who may sell liquors to any Indian "under the charge of an Indian superintendent or Indian agent." The character of the Indian, and not the character of the place, determines, according to the letter of the law, the nature of the transaction. The statute expressly directs its penalties against the introduction of liquor into the Indian country, and just as expressly against sales of liquor to Indians in the care of superintendents, irrespective of the jurisdictions within which the transactions may occur.

But doubt is removed by comparing the provision of the new with that of the old law. The act of 1862 *amends* the act of 1834. The earlier law provided only against the sales of liquor to Indians in the Indian country. The later law drops the words "*Indian country*," and substitutes for them the words "*under the charge of any Indian superintendent or Indian agent.*" Congress thus intended to embrace by the new law cases that were excluded by the old. Under the former law, unless the sale occurred in the Indian country, it could not be made the basis of a prosecution. Under the existing law every sale to an Indian in the predicament mentioned—whether the Indian be, at

the time, in the Indian country or in a State and within its jurisdiction—may be the subject of a prosecution.

III.

ASSUMING THAT THE INDIANS NAMED IN THE INDICTMENTS WERE, AT THE TIME OF THE SALES CHARGED, MEMBERS OF SUBSISTING INDIAN TRIBES, IN THE SENSE OF THE CONSTITUTION, WE CONTEND THAT THE ACT OF 1862 IS A VALID EXERCISE OF THE CONSTITUTIONAL POWER OF CONGRESS TO "REGULATE COMMERCE WITH THE INDIAN TRIBES," AND TO ENACT ALL LAWS "NECESSARY AND PROPER" TO CARRY THAT POWER INTO EXECUTION.

The *status* of the Chippewas of Saginaw and the Winnebagoes in Minnesota being determined, the question is, whether it is within the constitutional competency of Congress, or whether the power belongs solely to the States of Michigan and Minnesota, respectively, to regulate trade and intercourse occurring at places within their jurisdiction and beyond any Indian reservations between citizens of those States and members of those Indian communities.

It is not necessary in order to establish the power of Congress to regulate such trade and intercourse that the authority of the States to legislate concurrently with the nation upon the same subject should be either denied or disproved. It may well be that Michigan and Minnesota might also punish their own citizens for vending liquor or other articles of merchandise to Indians within their borders. The exercise of such a power by those States might not be incompatible with the exercise of the same power by the federal government.

Many offences cognizable by the federal courts are punishable also under the laws of the States.

But the doubt which is suggested, and now to be resolved, is on the point whether the power under consideration belongs exclusively to the States. Whether, in other words, any laws enacted by Congress for the government of intercourse with the Indians can constitutionally affect the citizens of a State in respect to transactions with the Indians not occurring within their reserved territory, but occurring in places completely subject to State jurisdiction.

* *

During the period of the revolutionary government, and prior to the adoption of the Articles of Confederation, Congress—"the supreme council of the American colonies"—directed and managed our national relations with the Indians as subjects necessarily within the jurisdiction of the general government.

The "Confederation," says Chief Justice Marshall, "found Congress in the exercise of the same powers of peace and war, in our relations with the Indian nations, as with those of Europe." (Worcester *vs.* Georgia, 6 Pet., 557. See also Blunt's Historical Sketch, p. 64.)

The power conferred on Congress by the Articles of Confederation, was the result of much deliberation, and finally of compromise. In the original draft of that instrument the power stood of "*managing all affairs with the Indians.*" In the Committee of the Whole the words "*not members of any of the States*" were added. On being thus reported, a motion was

made in Congress to strike out this addition, and to insert "*not residing within the limits of any of the United States.*" Again, a motion was made to amend the frame of the instrument, so as to read "*managing all affairs relative to peace and war with the Indians not members of any particular State; and regulating the trade with such tribes as are not resident within such limits, wherein a particular State claims and actually exercises jurisdiction.*" These amendments were all withdrawn, and one was introduced that was finally adopted and incorporated into the Articles. That conferred upon Congress the power "*of regulating the trade and managing all affairs with the Indians not members of any State; provided that the legislative right of any State within its own limits be not infringed or violated.*" (See Secret Journal of Old Congress, vol. 1, p. 281, 294, 322.)

It is well known, as Chief Justice Marshall states in his opinion in the Georgia Cherokee case, and as is very fully shown in the admirable *Historical Sketch* of Mr. Blunt, that "the ambiguous phrases which follow the grant of power to the United States in the Articles of Confederation were so construed by the States of North Carolina and Georgia as to annul the power itself." All question on the subject of the future relations of the Indians to the government was intended to be set at rest by the adoption of the Constitution, which confers on Congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indians. "These powers," says Chief Justice Marshall, "comprehend all that is required for the regulation of our intercourse with the Indians.

They are not limited by any restrictions on their free actions. The shackles imposed on this power in the confederation are discarded."

It seems to us to be clear, if it should be determined that, anywhere within the limits of a State, the exclusive power of legislation in regard to commercial intercourse with the Indian tribes belongs to the State, and that nowhere within a State, save upon territory reserved for the occupation of one of such tribes, can the laws of Congress on that subject constitutionally operate upon the citizens of the State, that the shackles of the confederation, intended to be discarded by the constitution, would be reimposed on the sovereign power of Congress over that important national subject.

In exercising the power of regulating commerce with the Indian tribes, as in legislating under every other grant of power, Congress acts upon and legitimately controls, as was said by Chief Justice Marshall, "all individuals or governments within the American territory." (Cohens *v.* Virginia, 6 Wheaton, 414.)

The power conferred is a power over the SUBJECT, and it may be exercised, without limitation or restriction, upon all persons and in all places within the territorial limits of the Union.

Let us now consider the extent of the legislative power of Congress over the people of the States in which the prosecutions originated, before they emerged from their condition as Territories, and compare it with the legislative authority exercisable by the federal legislature after that event, in order that

we may determine, with some degree of precision, what power passed from Congress when the Territories became States, and what continued to abide with it.

During the territorial life of those States Congress possessed exclusive power of legislation in regard to them, and lawfully subjected all persons, citizens of the United States as well as members of independent Indian tribes, resident within their limits, to the control of laws enacted for the civil government of the Territories. Political jurisdiction over the Indian tribes was not exercised nor claimed by Congress. They were allowed to govern their own internal affairs according to their own usages and laws. But the power of the federal government to subject Indians as well as whites to laws enacted for what we have called the civil government of the Territories was affirmed by this court in the case of *United States* vs. *Rogers*, (4 How., 572,) in which Mr. Chief Justice Taney declared "that the Indian tribes residing within the territorial limits of the United States are subject to their authority; and *where the country occupied by them is not within the limits of one of the States*, Congress may by law punish *any* offence committed there, no matter whether the offender be a white man or an Indian."

By the 25th section of the act of June 30, 1834, Congress extended over the Indian country "so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States," with the qualification that they should not extend to crimes committed by one Indian

against another. Crimes committed within the Indian territory by Indians against whites, were, by this statute, made cognizable by the judicial authority of the United States.

Under the power to regulate commerce, Congress also possessed power, while Michigan and Minnesota were Territories, to enact all laws deemed necessary and proper for the regulation of trade and intercourse with the Indians, and such laws operated throughout the Territories—within the reserves inhabited by the Indians as well as beyond their confines.

Now, what was the result of the transformation of Michigan and Minnesota into sovereign States of the Union? What power was shorn from the national legislature? What power was conferred upon the new States? Clearly, by that change in the political condition of those communities, Congress was deprived of but *one* of the powers to which we have adverted—namely, the power of exercising exclusive and universal legislation within their territorial limits by virtue of its authority to govern the Territories of the United States. All authority previously exercisable by Congress under its constitutional jurisdiction over the Territories of the United States terminated, of course, in respect to Michigan and Minnesota, when they became States of the Union. The territorial power of Congress, so to denominate it, was not capable of being exerted, after that event, even over the Indian reserves existing within those States. The reserves were not the Territories of the United States in the sense of the Constitution, and, therefore, under the power to govern those Territories, Congress, after the erection of State governments, could not legislate

for the government of people, Indians or citizens, residing within them. (U. S. *v.* Bailey, 1 McLean, 234.) It is needless to inquire the extent of its power in respect to legislation affecting the Indian tribes inhabiting the reserves, by virtue and in pursuance of treaties, duly made with those nations, in force on the admission of the States into the Union. But independently of treaties and legislative power thus conferred upon the general government by the Indians themselves, we apprehend that Congress, after the erection of State governments, was not competent to extend its laws for the government of places within the exclusive jurisdiction of the United States over reservations, in the States, occupied by independent communities of Indians. The ultimate title to the Indian lands continued in the United States, unless parted with to the States after the admission of the States into the Union; but no exclusive civil or political jurisdiction over the reserves remained in the United States. The States were competent to exert a qualified sovereignty over the persons and property of the Indians inhabiting the reserved lands. This court has said, speaking by Mr. Justice Grier, in the case of the Senecas of New York, that, notwithstanding the peculiar relations of that nation to the general government, the State of New York had the power of a sovereign over their persons and property, "*so far as it was necessary to preserve the peace of the commonwealth and protect those feeble and helpless bands from imposition and intrusion.*" The court further declared that "the power of a State to make such regulations to preserve the peace of the community is absolute and has never

been surrendered. (State of New York *v.* Dibble, 21 How., 370.)

While by the change in the political relations of these States to the United States, effected by their entrance into the Union, Congress was deprived of all power of legislation for the Indian reserves under the authority to govern the Territories belonging to the nation, and after that change possessed no power, except under treaty stipulations, to affect independent and self-governing Indian tribes occupying the reserved lands *directly* and *primarily* by its legislation, the elevation of the Territories to the position of States did not relieve their citizens, or any of them, from any control and authority which Congress constitutionally exercised over them, by virtue of the power to regulate commerce with the Indian tribes, during the territorial life of the communities. All laws governing trade and intercourse with Indian tribes continued to apply to the people of Michigan and Minnesota after their admission into the Union, with the same constitutional force and validity as before that event.

If trade of a particular character within and beyond the reservations was prohibited by the regulations of Congress enacted before the territories became States, such prohibition continued to apply to that trade, and to control the conduct of the citizen, with the same efficiency and constitutional effect after the erection of the State governments. As those regulations before that event applied to the particular trade wherever conducted, whether within or without the reserves, and altogether irrespectively of the places where it was carried on, so, after that event, they continued to operate upon all citizens in respect to the inhibited

intercourse wherever they might engage in it within the limits of the States.

The power to regulate commercial intercourse with the Indians within their boundaries, and to control all their citizens by the regulations made in pursuance of that power, was one which the States, when they entered the Union, consented that Congress should continue to exercise. The consent was *not* that the power should be employed so as to control the conduct of their citizens in respect to commerce within the lands reserved to the Indian nations, but that every act of commerce with Indians recognized and treated by the political power as members of independent Indian communities, wherever and by whomever engaged in within the State, should be subject to the control of the national legislature. This was the extent of the authority which each State who sanctioned the Constitution conferred upon Congress.

The right of Congress to regulate or prohibit particular traffic with the Indians within the jurisdiction of a State is not limited to the regulation or prohibition of such traffic within the limits of reserves set apart for the occupancy and government of the tribes, because the right to regulate intercourse with the Indian tribes does not flow from any authority exercisable by Congress over or within such reserves by reason of their legal character and relations to the United States, but from a specific grant of power to the United States over the whole subject of commerce with those aboriginal nations and the people composing them.

Congress, as has been shown, we think, can exercise, within the Indian reserves in a State of this

Union, no power save that which is implied from, and incidental to, the power to regulate trade with the Indians, unless other and different authority has, in the case of particular Indian nations, been conferred by treaty stipulation.

The power to regulate commerce is exercisable within the reservations independently of the character of the places. The legal quality of those places does not confer, nor can it define, the limits of the jurisdiction. And, for the same reason and to the same extent, is the power of Congress to affect commercial intercourse with the Indians within places where a State is absolutely sovereign, independent of, and unrestrained by, the jurisdiction lawfully exercisable therein by the constituted authorities of the State. In the case of the Indian reserves the power of Congress on the subject is not enlarged by the character of the places. In the case of places within the jurisdiction of the State beyond the reserves, the power is not limited, nor in any respect restrained, by the legislative sovereignty of the State government.

The inherent quality of the *place* where the commercial intercourse occurs, cannot, as we conceive, enter into the consideration when any question is raised as to the constitutionality of legislation under this grant of power.

If the legislation be a regulation of commerce with the Indians, within the meaning of the Constitution, (and that is the only question,) it must take effect wherever the commerce regulated takes place, and upon whomsoever, within the jurisdiction of the United States, may engage in that commerce.

We may readily conceive of an Indian tribe to whom no reserve belongs exercising all the political powers and rights of an independent community within a State of the Union. Chancellor Kent, in his opinion in the great case of *Goodell* v. *Jackson*, declares that a claim asserted and maintained by a State to exercise civil jurisdiction over territory occupied by Indians resident within it—to define and punish offences committed in the Indian reservations within the borders of the State—may be "perfectly consistent with the admission of the alienage and distinct national character of the Indians." (20 Johnson, 715.) But the further case may be supposed of an alien Indian community living, by sufferance and permission of a State, within its borders, and occupying lands to which it possessed no title independently of the State, and from which they might, at any time, be excluded by the local authorities. Would it be contended, in the case of Indians so situated, that the laws of Congress for the regulation of intercourse with Indian tribes could have no application, and could not be enforced, in regard to intercourse occurring anywhere within the territorial limits of the State; or, if it were conceded that those laws would not be wholly inoperative, that they could only be enforced in respect to intercourse within the portion of territory actually occupied in the manner supposed by the resident tribe? If it should be maintained that trade occurring within the limits of the Indian occupation might be regulated by Congress, but that trade with the Indians beyond those limits, and in the State generally, could not be interfered with by Congress, we would desire to be informed the basis of such a distinction between trade

within and trade without the place occupied by the tribe as concedes the power of Congress to regulate the former and denies that Congress has authority to regulate the latter. Certainly nothing in the character of the *place* occupied by a tribe situated as we have supposed could confer an authority upon Congress in the case of trade within it which, by virtue of the *subject*—that of "commerce with the Indian tribes"—Congress could not lawfully exercise in the case of trade without that place. It must be, if such a case of inhabitancy as is supposed should occur, that the laws of Congress, and not the laws of the State, relative to commercial intercourse with Indian tribes, would determine the lawfulness or illegality of particular trade with individual Indians belonging to the resident Indian community, whether it occurred within or without the place actually occupied by it. It must be that Congress would possess universal power to determine the regulations pursuant to which intercourse with such Indians should be held, and that the rules and laws of Congress on that subject could constitutionally be made to apply everywhere and to operate on all persons throughout the territorial jurisdiction of the State.

We cannot perceive the philosophical basis of that theory of the constitutional power of the federal government under consideration which holds that Congress invades the sovereignty of a State when it attempts to take cognizance by its legislation of any commerce with the Indians that does not occur either within what is termed the Indian country or the places in the States of the Union set apart by treaties for the occupation of Indian tribes.

Commerce involves and implies intercourse between individuals of the same or of different communities. Commerce with foreign nations is intercourse and trade between individuals here and individuals abroad. So commerce with the Indian tribes takes place when any citizen of the United States engages in trade with individual members of Indian tribes. In the view now presented such trade and intercourse, wherever they may take place, and whosoever may engage in them, are subject to the supreme government of Congress. The laws of Congress on the subject have application and force throughout the United States—in the States as well as in Territories, within the reservations of Indian tribes as well as beyond those reservations—and by those laws are the validity and the entire legal character of any communication with the Indians, within the designation of commerce with them, to be legally tested. In the language of Chief Justice Marshall, "this power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. If, as has been always understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States [and with the Indian tribes] is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." (Gibbons *v.* Ogden, 9 Wh., 196–7.)

IV.

THE INDIANS NAMED IN THE PRESENT INDICTMENTS WERE, AT THE TIME OF THE SALES CHARGED, MEMBERS, RESPECTIVELY, OF SUBSISTING "INDIAN TRIBES," WITHIN THE CONSTITUTIONAL DESIGNATION OF THAT PHRASE.

In discussing, under the previous head of the argument, the question of the constitutional power of Congress to regulate all trade with individual Indians connected by ties of blood and allegiance with independent communities of Indians designable as "Indian tribes"—whether such trade may occur within or beyond the Indian country, within or without Indian reserves in States of this Union—we assumed, *firstly*, that the Chippewas of Saginaw and the Winnebagoes in Minnesota constituted, respectively, such tribes, and, *secondly*, that the individual Indians named in the indictments were members, respectively, of those tribes, and in full association and fellowship with them.

It remains now to consider whether the *status* of those Indians were, at the time in question, such as we have assumed them to have been.

It will not be denied, perhaps, that the judicial tribunals of the nation, in deciding the *status* of any particular body of Indians, will take their rule of decision from the public acts and declarations of the political power of the government. While the courts are competent to determine the legal effect of such acts and declarations, they are not competent to go behind them and review the ground on which they are founded, for the purpose of determining whether

the political power was justified in forming the judgment concluded and expressed.

"The acts of our government," said Chief Justice Marshall, in the case of the Cherokees *vs.* Georgia, "plainly recognize the Cherokee nation as a State, *and the courts are bound by those acts.*" (5 Peters, 15.)

And in the subsequent case of Worcester *vs.* Georgia, Mr. Justice McLean declared that "if a tribe of Indians should become so degraded or reduced in numbers as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. The point at which this exercise of power by a State would be proper need not now be considered, *if, indeed, it be a judicial question.* So long as treaties and laws remain in full force, and apply to Indian nations exercising the right of self-government within the limits of a State, *the judicial power can exercise no discretion in refusing to give effect to those laws when questions arise under them*, unless they shall be deemed unconstitutional." (6 Peters, 592.)

Another principle which we suppose to be equally plain is, that the courts, in passing upon the constitutionality of laws enacted under the power we have been considering and applied, or attempted to be applied, to citizens in regard to their intercourse with Indians, will not, in the case of any particular community of Indians, consider or advert to the degree of tribal organization possessed by that community, or the purpose for which such organization may be maintained. Whether the organization as a tribe be, in fact, absolute or qualified, perfect or imperfect, whether it be maintained for one purpose merely or

for many purposes, are not, we apprehend, subjects for the consideration of the judicial authorities of the nation, in exercising their functions of judging the validity of laws enacted under the power to regulate commerce with the Indians. The validity of such laws cannot, we submit, depend, or be made to depend, in any case, upon the extent to which the independent tribal organization may have been dissolved or may still subsist. So long as the national or tribal character of any particular body of Indians is maintained, or is recognised as maintained, for any purpose or to any extent, by the executive and legislative branches of the government, the judicial branch must give force and effect to all existing laws which may affect the relations and conduct of citizens of the United States toward the members of that community.

If treaties subsist between the United States and any body or band of Indians which declare or recognise an existing condition of tribal organization among them, the courts are not at liberty to treat the members of such Indian community as absorbed into the bodies politic of the States or the nation, and as constituting members of those bodies politic. So long as any condition of tribal organization subsists in the case of a nation or band of Indians, the executive is competent to negotiate treaties with it, and it may be lawfully compelled to perform the stipulations of treaties to which the community, in its political capacity, may have become a party; and it must be for the treaty-making power to retain in its own possession authority to declare when the tribal organization of such Indians may cease to exist, with due regard to the public interests.

It is needed now briefly to apply these remarks to the cases of the two tribes of Indians concerned in the present prosecutions.

1—*The Chippewas of Saginaw.*

The "Saginaw tribe of the Chippewa nation" are parties to many treaties with the United States. (See Treaties of January 14, 1837, Stat. at Large; Indian Treaties, p. 528, of January 23, 1836, *ib.* p. 565.) But as, at the date of the prosecution against *Holliday*, the *status* of that tribe was principally defined and established by the treaty of August 2, 1855, it will be sufficient for the present purpose to advert to it. (See 11 Stat. at Large, 633.)

By this treaty the Chippewas ceded to the United States their reservations within the State of Michigan, and surrendered certain annuities secured to them by former treaties; and, in consideration therefor, received from the United States grants of land in six adjoining townships in the county of Isabella, and of a tract of land, equal to two townships, on the north side of Saginaw bay; and also certain sums of money payable in the manners and at the times specified in the treaty.

Article 6 provides that "the tribal organization of said Indians, except so far as may be necessary to carry into effect the provisions of this agreement, is hereby dissolved."

The time necessary to carry out the provisions of the treaty is ten years from its date. Thirty thousand dollars are payable for educational purposes in *five* equal *annual* instalments of four thousand dollars each, and in *five* subsequent equal annual instalments of two

thousand dollars each. The sum payable for agricultural implements is to be expended in annual instalments during a period of ten years. And again, the annuities payable *per capita* are to be paid during the same length of time.

The purposes and objects for which much of this money is payable are national ones, in so far as the Indians are concerned. The provisions of the treaty in regard to them imply that, during the ten years contemplated by them the Saginaw bands of the Chippewas will maintain a political organization capable of administering for the public weal of their independent community the funds receivable for educational and other general public purposes.

The provision of the treaty cited amounts, therefore, we submit, to this, that during the ten years required for the execution of the stipulations on the part of the government the tribal organization of the Chippewas of Saginaw shall continue, and that, after the expiration of that period, it shall cease to exist, unless otherwise declared and stipulated by further treaties.

The period contemplated by the treaty, as requirable for its due fulfillment, on the part of the United States, had not expired at the date of the present prosecution against Holliday in 1863.

2—*The Winnebagoes.*

By the treaty of Fort Armstrong, concluded September 15, 1832, the "*Winnebago nation*" ceded to the United States all the lands to which that "nation" had title or claim lying to the south and east of the Wisconsin river, and the Fox river of Green Bay;

and, in part consideration of that cession, the United States granted to the "*Winnebago nation*" that part of the tract of country on the west side of the Mississippi known as the "neutral ground." (7 Stat. at Large, 371.) By the treaty of October 13, 1846, between this Indian nation and the United States, the former ceded to the latter all lands claimed by it within the States and Territories of the United States, and received in exchange therefor a certain tract of country, north of St. Peter's and west of the Mississippi, in the Territory of Minnesota. (9 Stat. at Large, 878.) And lastly, by the treaty of February 27, 1855, the tract of country granted to the tribe by the treaty of 1846 was ceded by the Winnebagoes, and in compensation therefor the United States granted to them as a "*permanent home*" a tract of land, equal to eighteen miles square, on the Blue Earth River, in the Territory of Minnesota. (10 Stat. at Large, 1173.) The 8th article of this last treaty provided that "the laws which have been or may be enacted by the Congress, regulating trade and intercourse with the Indian tribes, shall continue and be in force within the country herein provided to be selected as the future permanent home of the Winnebago Indians, and those portions of said laws which prohibit the introduction, manufacture, use of, and traffic in, ardent spirits in the Indian country shall continue and be in force within the country herein ceded to the United States, until otherwise provided by Congress."

Subsequently the Territory of Minnesota became a State of the Union, and by the act of February 21, 1863, the President was authorized to effect the removal of the Winnebagoes from the State, and the

Secretary of the Interior was required to open the reservation secured to those Indians by the treaty of 1855 to pre-emption entry and settlement, in the same manner as the other public lands. (12 Stat., 659.)

The present indictment against *Haas* was found at the June term, 1862, of the district court for Minnesota. (Rec., p. 1.) The offence charged was, therefore, committed prior to the passage of the act for the removal of the Winnebagoes from the State, and while they were in the full occupation and enjoyment, as an Indian "*nation*," of the reservation—their "permanent home,"—within the State of Minnesota, under the protection and guarantee of the subsisting treaty of 1855.

We submit that the judgment of law must be, under the foregoing facts, that the two Indian communities referred to were, at the times of the prosecutions, "Indian tribes," in the meaning of the Constitution.

V.

THE INDIANS MENTIONED IN THE INDICTMENTS WERE, RESPECTIVELY, IN CHARGE OF INDIAN AGENTS APPOINTED BY THE UNITED STATES.

The government exercises control and supervision over the Indian tribes by the medium of certain designated officers, whose duty it is to see that the general and special laws passed by Congress in reference to Indian tribes, and that the regulations made by the Interior Department under the authority of those laws, are carried into effect. The fulfillment of treaty stipulations is the special care of those officers, acting under instructions from the Interior Department. So long as treaty stipulations have not expired, and agents are

appointed under authority of Congress to take charge of the tribes, and any expenditure of government money continues to be made on behalf of the tribes, or individuals composing them, so long do those tribes continue in charge of the agents designated to carry out those purposes. Members of tribes who are the recipients of benefit or bounty under treaties with the United States, cannot divest themselves of their relations to their tribes, and place themselves beyond the care and control of the agents of the government without authority of law. Each individual member of an Indian tribe continues, in contemplation of law, subject to the control exercisable by the agent of the government over his tribe until he is relieved therefrom by authority of treaty stipulation or other law. So long as the chiefs or head men of the tribe are the *media* of communication with him for the purpose of payment of treaty money, he continues "in charge" of the agent of the United States, wherever he may actually be or reside. We refer to the treaty with the Pottawatomies, of 1861, as furnishing an instance where provision was made for enabling Indians to divest themselves of their tribal character and become citizens of the United States, and thus to place themselves out of the charge of any Indian agent. (See 12 Stat. at Large, 1192, article III.) We are informed that several cases exist in which individual Indians or families, when their tribes removed to western reservations, were permitted to remain in their former places of residence, and there receive their annuities. This occurred in the cases of certain members of the Miamies of Eel river, Miamies in Indiana, and the Pottawattomies of Huron, and of a remnant of the

Chippewas and Pottawattomies in Michigan, who remained in Indiana and Michigan when their tribes removed from those States. Such Indians are not in charge of agents, in contemplation of law. They are subject to all the laws of the States in which they live, unless otherwise provided by special legislation.

VI.

THE EFFECT OF THE CONSTITUTION AND LAWS OF MICHIGAN IN THE PROSECUTION AGAINST HOLLIDAY.

1. If the court determine that the Chippewas of Saginaw were a tribe, in the constitutional sense of that term, it must, of necessity, decide that the particular Indian (Otibsko) was, at the time in question, a member of that tribe. The replication alleges that his position was the same as that of the rest of the Chippewas of Saginaw, residing, under the treaty of 1855, in Isabella county. We have endeavored to show that, notwithstanding the provision of the 6th article of the treaty of 1855, the Chippewas of Saginaw continued to be, and were at the date of the prosecution, an Indian tribe. The members of that tribe were not, therefore, citizens of the State of Michigan, according to the provision of the Constitution of that State mentioned in the defendant's plea. (See Rec., p. 2.)

2. It is stated in the plea that, by law in Michigan, "all Indians may sue and be sued in the State courts, in the same way as other inhabitants, and that they are entitled to the same judicial rights and privileges."

We think that it follows as a corollary from the proposition adjudicated by this court, in the case of Worcester *v.* The State of Georgia, that a State can-

not, by any laws of this character that it may deem right to enact relative to the Indian tribes within its territory, deprive the federal government of its constitutional power in regard to such tribes. The State cannot determine for the federal government the particular bodies of Indians with whom treaties may be entered into, nor affect the legislative power of the federal government, exercised pursuant to the determination of that question by the treaty-making power. It is for the political power of the general government to decide, absolutely, what bands or communities of Indians constitute tribes competent and qualified to become parties to treaty stipulations; and it is for the legislative power of that government to enact laws which shall bind the citizens of all the States, and absolutely control their conduct in regard to those communities of Indians recognised as tribes by the proper authority.

No obstacle which any State may attempt to place in the way of the federal government in exercising these powers will avail to interfere with their lawful exercise. *As a State cannot dissolve by force the tribal organization of an Indian community, and abrogate or annul, in that way, the treaties subsisting between that community and the government, for the same reason, and to the same extent, is a State powerless in law to affect the* STATUS *and relations of any such community by conferring upon its members rights and privileges which may be supposed to be incompatible with their separate nationality.* The destruction of such a nationality, in any case, and the consequent abrogation of the power of the general government based upon it, can only be produced by a co-operation of the State and federal

governments. The latter must consent that the laws of the State shall have the effect attributed to them before such effect can be given to them in a court of the United States.

The language held by Mr. Justice McLean, in the case of Worcester *v.* Georgia, here applies. The federal government, he said, has the exclusive regulation of intercourse with the Indians; and, so long as this power shall be exercised, it cannot be obstructed by the States. It is a power given by the Constitution, and sanctioned by the most solemn acts of both the federal and State governments; consequently, it cannot be abrogated at the will of a State. It is one of the powers parted with by the States. If it shall be the policy of the government to withdraw its protection from the Indians who reside within the limits of the respective States, the laws and treaties which impose duties and obligations on the general government should be abrogated by the powers competent to do so. So long as those laws and treaties exist, having been formed within the sphere of the federal powers, they must be respected and enforced by the appropriate organs of the federal government.

VII.

On the foregoing grounds we submit that the court should certify as its opinion—

1st. That the act of 1862 does, by proper construction, extend to sales of liquor such as are charged in the indictments.

2d. That Congress had constitutional power to prohibit and punish the acts charged under the circumstances disclosed in the present records.

3d. That the Indians named in the indictments were under the charge of Indian agents within the meaning of the statute.

4th. That the Indian named in the indictment against Holliday was a member of a tribe, and not a citizen of Michigan within the meaning of its constitution.

5th. That the constitution and laws of Michigan were not a bar to the said indictment.

JAMES SPEED,
Attorney General.

J. HUBLEY ASHTON,
Assistant Attorney General.

1309

Supreme Court of the United States.

THE UNITED STATES,
vs.
LORTON HOLLIDAY.

On certificate of division of opinion from Eastern District of Michigan.

BRIEF FOR DEFENDANT.

The main question in this case lies within narrow limits. The United States claim the right to punish, as a criminal offense, the selling of liquor to an Indian, under the following circumstances: He was connected with a tribal organization, only so far as to receive his allowance from the United States, through the chief or head man. He was a land owner in his own individual right, and a tax payer in the State of Michigan. The liquor was sold to the Indian, not on an Indian reserve, but in an organized county of Michigan, as exclusively under her jurisdiction as the city of New York is under the jurisdiction of the State of New York. And, if the liquor had been sold to this Indian at the Astor House in New York, the proprietors of that house would have been liable, on the same principles, and to the same extent as this defendant.

The facts of the case appear, from the record, in a condensed form.

This was an indictment for selling and giving liquor to an Indian.

There was a special plea filed by the defendant, and a replication to it by the United States, and a demurrer to this by the defendant.

The offense is alleged to have been committed in Gratiot county, in Michigan.

It appears by the plea that this is an *organized* county of the State of Michigan, not within the Indian country, and that there is, in fact, no Indian reservation within it.

Certain facts are also set forth, showing that the Indian belonged to no tribe, and that he was a citizen of the State of Michigan.

The indictment is found under the act of 1862, (page 338), amending the former law of 1834, 4 Stat. at large, 129, Bright Dig. 427, 429.

See 20th section of the act.

It is conceded that Gratiot county is not within the Indian country.

FIRST PROPOSITION.

The language of the act of 1862, properly construed, does not extend to a transaction of this kind, not committed within the Indian country, or at least upon an Indian reservation.

I. On every principle this act is to receive a *strict* construction.

1st. It is a penal act.

2d. It is of doubtful constitutionality.

II. No violence is done to the *language* of the statute, by confining its operation to Indians under the charge of an agent *within the Indian country.*

First. It was the evident *policy* of the act to protect the Indian, *within the Indian country.*

While there, he was under the control of the United States. They could make regulations for such territory, and it was not their policy to do more.

See the act of 1834, sec. 20.
Am. Fur Co. v. U. S., 2 Peters, 359.

Second. The policy of the law is fully sustained by the construction that the *introduction* of liquors into the Indian country shall be illegal.

This would not extend to liquors taken there for personal stores, or for troops of the United States.

Then the construction is reasonable, that the law of 1862 intended a *restriction* on the former act to this extent: That liquors, *within the Indian country*, should not be sold or given to Indians existing in a tribal organization, and under the care of a superintendent or agent.

Suppose that a civilized, educated Indian should be there, a citizen of another State, and should be the recipient of a glass of wine at a military post; would that be an offense under this act?

It would have been under the former.

Third. This construction is maintainable, if we adopt the rule that only while within the Indian country, or

upon an Indian reservation, is the Indian to be considered under the charge of the agent or superintendent.

And this is the reasonable construction of the act. Otherwise it will be a penal offense to give, in New York or Detroit, a glass of wine to an Indian, who draws an annuity from the United States.

SECOND PROPOSITION.

If the act of 1862 be so construed as to embrace this charge, under the admitted facts of the case, then its enactments are beyond the powers of Congress, in conflict with the rights of the State, and are so far void.

I. It is plain, that as the offense was not committed in any place within the *exclusive* jurisdiction of the United States, the right of Congress to legislate for its punishment can be founded only on the notion that it was an offense against federal sovereignty.

See Wharton's Crim. Law, sec. 174 to 180, and Statutes and Decisions there cited.

II. Congress has never claimed, and cannot lawfully exercise the power of legislating for Indians, except as *tribes* or *quasi* domestic nations.

When they lose this relation and character, and become citizens of a State, or as individuals, become separated

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from their *ordinary* tribal connections, they pass from the jurisdiction of the United States.

1st. The limits of the agency are established by tribes or geographical boundaries.

Brightley's Dig., 492.

The general duty of the agent is to manage and superintend the *intercourse with* the Indians.

This assumes their separate and social condition.

2d. It is only while in this condition, *actually* existing as independent communities, that Congress has exercised this power.

See 2 Kent, 379 to 386.
Johnson v. McIntosh, 5 Pet. Cond. 515, 8 Wheaton, 543.
Cherokee Nation v. Georgia, 5 Pet. 1.
Worcester v. Georgia, 6 Pet. 515.
U. S. v. Cisna, 1 McLean, 254.
Fellows v. Blacksmith, 19 Howard, 370.
New York v. Dibble, 21 Howard, 370.
Rogers' case, 4 Howard, 572.
Strong v. Waterman, 11 Paige, 610.
Jackson v. Goodell, 20 Johnson, 188.
Jackson v. Goodell, 20 Johnson, 693.
Brashear v. Willis, 10 Alabama, 630.
Morrow v. Blivins, 4 Humph. 223.
See, also, 16 N. Y. 221, 23 N. Y. 420.
Law Register for Jan., 1863, p. 175.

III. The facts show that this Indian was so placed as to bring this case within these principles and authorities.

1st. The tribal organization was, in fact, dissolved.

The lands were owned in severalty.

And all that remained of the tribal association was connected with the convenience of paying annuities.

And even these were to be distributed *per capita*.

See 11 Stat. at large, p. 633, in connection with p. 621, and vol. 7, p. 528 and 503.

2d. This Indian became a citizen of the State of Michigan.

See Constitution, article VII., sec. 1; 2 Comp. L., p. 1139, sec. 4126.

IV. Conceding, for the sake of the argument, that the Indian was a member of a subsisting tribe, and under the charge of an Indian agent, still, *after he came within the limits of the State*, away from the Indian country, or any Indian reservation, he became subject to the laws of the State; and it was incompetent for the United States to take cognizance of the act charged, and to punish it as a crime against the federal government.

The whole subject of the regulation of the use and sale of liquors, within the State, and away from Indian reservations, is a matter for the State in the exercise of its police powers.

See License Cases in 5 Howard, 504.

The State of Michigan has exercised this power, and prescribed the penalty.

The offense was within the jurisdiction of the State of Michigan.

See U. S. v. Beavans, 3 Wheat. 336.
4 Pet. Cond. 277 and note.

The act, in the locality where committed, was not an offense against the limited sovereignty, or the public rights, public justice, public peace, public trade, or public police of the United States.

See U. S. v. Coolidge, 1 Gall. 492.

V. This legislation, as construed by the Government in this case, cannot be sustained under the power of Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

The present act is not, in any way, a regulation of commercial intercourse.

See U. S. v. Bailey, 1 McLean, 234.

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DETROIT, Dec., 1865.